

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

STRATTON PEAY,)
) Civil Action No. 16 – 130E
Plaintiff,)
) District Judge Barbara Rothstein
v.) Magistrate Judge Lisa Pup Lenihan
)
SAGER, *et al.*,)
)
Defendants.)
)

MEMORANDUM ORDER

Plaintiff initiated this prisoner civil rights action on June 6, 2016, with the submission of a Motion to Proceed *in forma pauperis*. (ECF No. 1.) That Motion was granted (ECF No. 2) and Plaintiff's Complaint was docketed on June 23, 2016 (ECF No. 3).

Defendants Berry, Bertolini, Cowan, Ennis, Gustafson, Horton, Kunig, Miller, Oberlander, Overmeyer, Rittenhouse, Sager, Sheasly, Simon, Smail and Smith (the "Corrections Defendants") waived service (ECF No. 19) and filed a Motion for More Definite Statement on February 7, 2017. (ECF No. 21.) That Motion was granted and Plaintiff was ordered to file an amended complaint. (ECF No. 23.) The Amended Complaint was filed on June 26, 2017. (ECF No. 29.) The Corrections Defendants then filed a Motion to Dismiss the Amended Complaint for Failure to State a Claim (ECF No. 33) and in response Plaintiff filed a Second Amended Complaint on September 13, 2017 (ECF No. 44). The Corrections Defendants' Motion was then dismissed as moot. (ECF No. 47.)

Defendant Lisa Zupsic filed a Motion to Dismiss the Second Amended Complaint (ECF No. 45), which the Court converted into a Motion for Summary Judgment on the issue of Plaintiff's exhaustion of administrative remedies (ECF No. 48). However, that Motion was dismissed as moot (ECF No. 53) when Defendant Zupsic filed an Amended Motion to Dismiss the Second Amended Complaint on September 21, 2018. (ECF No. 50.) Plaintiff filed a Response in opposition to Defendant Zupsic's Motion on September 29, 2017 (ECF No. 55) and another Response in opposition on October 6, 2017 (ECF No. 57). Defendant Zupsic filed a Reply brief on October 9, 2017. (ECF No. 58.) On October 20, 2017, Plaintiff filed a Response to Defendant Zupsic's Reply. (ECF No. 65.) On January 17, 2018, the Court once again informed the parties that Defendant Zupsic's Amended Motion to Dismiss the Second Amended Complaint would be treated as a Motion for Summary Judgment on the issue of Plaintiff's exhaustion of administrative remedies. (ECF No. 68.)

On October 13, 2017, a Motion to Dismiss was filed by the Corrections Defendants. (ECF No. 59.) Plaintiff filed a Response in opposition on October 24, 2017. (ECF No. 66.) Plaintiff filed a Motion for Summary Judgment on January 30, 2018. (ECF No. 70.) Defendant Zupsic filed a Response in opposition to the Motion on February 8, 2018. (ECF No. 73.)

On March 2, 2018, the Magistrate Judge issued a Report and Recommendation recommending the Defendant Zupsic's Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No. 50), and the Motion to Dismiss filed by the Corrections Defendants pursuant to Federal Rule of Civil Procedure 12(e), 8(a), 10 and 20(a) (ECF No. 59), be granted. (ECF No. 75.) She further recommended that the portion of Defendant Zupsic's Motion that rested on Plaintiff's failure to exhaust his

administrative remedies be granted pursuant to Federal Rule of Civil Procedure 56. *Id.* Finally, she recommended that Plaintiff's Motion for Summary Judgment (ECF No. 70) be denied. *Id.* However, she recommended that Defendants' Motions be granted without prejudice to Plaintiff filing a third amended complaint to cure all deficiencies.

Plaintiff was served with the Report and Recommendation and informed that he had until March 19, 2018 to file written objections. *Id.* As of today, no written objections have been filed.

Therefore, after a *de novo* review of the pleadings and documents in this case, together with the Report and Recommendation, the following Order is hereby entered:

IT IS HEREBY ORDERD that the Report and Recommendation of the Magistrate Judge (ECF Nos. 75) is adopted as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendants' Motions to Dismiss (ECF Nos. 50, 59) are granted, and Plaintiff's Second Amended Complaint is dismissed as against all Defendants for failure to state a claim.

IT IS FURTHER ORDERED that the portion of Defendant Zupsic's Motion to Dismiss that was converted into a Motion for Summary Judgment on the issue of exhaustion of administrative remedies (ECF No. 50) is granted.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (ECF No. 70) is denied.

IT IS FURTHER ORDERED that Defendants' Motions are granted without prejudice to Plaintiff filing a third amended complaint within thirty (30) days of this order to cure all deficiencies. Plaintiff's amended pleading must comply with all applicable pleading rules, and the directives previously set forth in Judge Lenihan's February 13, 2017 Order, and address each of the defects identified in the Report and Recommendation. The amended pleading must stand

by itself without reference to earlier pleadings. Plaintiff's failure to file a third amended complaint will result in the granting of the Defendants' Motions with prejudice.

AND IT IS FURTHER ORDERED that this case is remanded back to the Magistrate Judge for all further proceedings.

Dated this 29th day of March, 2018.



Barbara Jacobs Rothstein
U.S. District Court Judge

cc: Stratton Peay
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(Via CM/ECF electronic mail)